No. 12,861

United States Court of Appeals

For the Ninth Circuit

National Labor Relations Board,
Petitioner,

vs.

Pinkerton's National Detective Agency, Inc., and Contract Guards & Patrolmen's Organizing Committee, I.L.W.U.,
Respondents.

BRIEF OF PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

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JURISDICTION.

This matter is before this Court upon petition by the National Labor Relations Board for enforcement of its order herein, which petition is filed herein pursuant to Section 10(e) of the Labor Management Relations Act, 1947.

STATEMENT OF THE CASE.

The sole issue before this Court is the interpretation and application of that portion of the Labor Management Relations Act, 1947, appearing in Section 10(c) thereof and reading as follows:

"Provided that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *."

FACTS.

The facts in this case are simple and are relatively free from conflict as the brief for the Board will show.

Under date of August 1, 1946, the International Longshoremen's & Warehousemen's Union, acting in behalf of certain of its locals, entered into a collective bargaining contract with Pinkerton's National Detective Agency, Inc., which by its terms was to remain in full force and effect until June 15, 1947, and was to be renewed from year to year thereafter unless either party gave notice to the other in writing of its desire to modify or terminate it not less than sixty (60) days prior to its anniversary dates. (R. p. 3.)

This contract contained a form of union security known as the "union shop" under which all employees are required to join the union within fifteen days of the date of their employment. (R. p. 31.)

Some time between June 15 and August 7, 1948, representatives of Pinkerton's and representatives of the Union met for the purpose of discussing the union shop provision of the contract. Pinkerton's representatives and its attorneys took the position that the union shop provision of the contract was repugnant

to the Act (because no election authorizing the union shop had been held and because the union had not qualified as required by Section 9 (f) (g) and (h) of the Taft-Hartley Act) while, on the other hand, the representative of the organizing committee and its attorney contended that, since the contract had automatically renewed itself, all provisions thereof were still in full force and effect. (R. pp. 32 and 33.)

With matters in this state of deadlock the union applied increasing pressure on the employer to prevent the employment of anyone not in good standing with the union. This is evident from the fact that, although on July 19 Camden, who was Pinkerton's manager, promised Stenhouse a job, on July 26 Camden told Stenhouse, "I just wanted to explain to you, Stenhouse, what the situation is. They are going to walk off the job if you walk on." (R. p. 35.)

Shortly thereafter the union demanded that Pinkerton's discharge the three other complainants, Conners, Slater and Holmes, for non-payment of dues in the union. When the employer refused to do so the union struck on August 7th. This strike was directed not solely against the three named complainants but was also intended to demonstrate to Pinkerton's that the union meant by every means at its command to prevent the reemployment of Stenhouse and the employment of anyone else who was not in good standing with the union. This is the construction placed upon the facts by the Trial Examiner.

With respect to Stenhouse, the Trial Examiner found that the organizing committee induced Pinker-

ton's discriminatorily to refuse employment to Thomas W. Stenhouse on and after July 23, 1948, because he failed and refused to maintain membership in good standing in the organizing committee. (R. pp. 54 and 79.)

The Trial Examiner further declared that the union had caused the employer to discriminate against all four complainants (including Stenhouse). The Trial Examiner said:

> "The Organizing Committee has caused Pinkerton's, an employer, to discriminate against the four-named complainants herein in violation of Section 8(a)(3) of the Act thereby restraining and coercing the employees of Pinkerton's in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(2) and 8(b)(1) thereof." (R. p. 56.)

The Board, however, limited the union's responsibility to three of the four named complainants, saying:

> "We have found that both Pinkerton's and the Organizing Committee are responsible for the discrimination suffered by Conners, Slater and Holmes." (R. p. 92.)
>
> "The complaint does not allege that the Organizing Committee was responsible for Stenhouse's discharge. * * *." (R. p. 79.)
>
> "* * * We are not warranted in going beyond the complaint to find on the record as it exists that the Organizing Committee violated Section 8(b)(2) by inducing Pinkerton's to discharge Stenhouse." (R. p. 80.)

> "It is uncontroverted, however, that Conners, Slater and Holmes were relieved of their respective assignments on August 7, 1948, upon demand of the Organizing Committee. The strike in 1948 was called by Johnson and it was not called off until Pinkerton's agreed to do the bidding of the Organizing Committee and lay off the three named persons." (R. pp. 53 and 54.)

Laying to one side for the time being the correctness of the Board's action in reversing the Trial Examiner's findings, we have here a situation where the employer has in good faith attempted to comply with the requirements of the statute and has stoutly resisted all threats of the union and all attempts by the union to force it to violate or to disregard the law up to and including taking a strike. After the strike had been called by the union and had been in effect for a period of two or three days and it was obvious that the employer had no chance of winning the strike but was confronted with the alternative of either going out of business or acceding to the union demands, the employer capitulated.

Both parties thereby violated the statute. With respect to back pay, however, the statute explicitly declares that the party *responsible* for the discrimination shall be liable for the back pay in such case. The question presented in this case therefore is whether the National Labor Relations Board can hold both the employer and the union jointly and severally liable for back pay merely by making a finding that they are both responsible for the discrimination. It is re-

spectfully submitted that such a finding is not supported by substantial evidence on the record considered as a whole.

ARGUMENT.

We are, of course, aware of the fact that there is a line of Court decisions upholding findings of the Board that, under the particular facts of these cases, both the employer and the union were responsible for the discrimination suffered by the employees in question. None of those Court decisions, however, purported to pass upon the question presented in this case as will be seen from the review of those decisions.

Perhaps the leading case on the point above discussed is the decision of the United States Court of Appeals for the Seventh Circuit in *Union Starch & Refining Co. v. N.L.R.B.,* 186 Fed. (2d) 1008. The precise point decided by the Court in that case appears from the following language which is quoted from the opinion of the Court:

> "Nevertheless, the company makes the point that *although* the company and the union may *both be responsible* for the unlawful discharge, the amended section 10(c) contemplates that 'either one or the other would be responsible for the back pay, but not both.' " (Italics ours.)
>
> * * * * * * *
>
> "Congress manifested no intent to restrict the remedial powers of the Board for a compulsory choice between the parties responsible for the discrimination suffered by the discharged employees. * * *"

It will be noted that the argument of the company *assumed* that *both* the union and the company were *responsible* for the discrimination and did not challenge the finding of the Board.

In that case, moreover, there was ample evidence from which the Board could find that both the employer and the union were responsible for the discrimination suffered by the employees. It appeared without contradiction in the evidence that the union wrote to the company demanding the discharge of the employees under the union-shop clause of the collective bargaining contract; whereupon the company made its own *independent* investigation to determine whether or not union membership was available to the employees on the same terms and conditions generally applicable to other members. The personnel director of the company met with the employees in question and interviewed them.

After the company's independent investigation the employees were discharged, not on the ground that they had not tendered dues and initiation fees, but because they had failed to file an application card to attend a meeting of, and take an oath of loyalty to, the union.

It thus appears that the union requested the employer to discharge the employees in question and that the employer *upon its own independent investigation* did so. As it turned out, both the union and the employer were incorrect in their interpretation of the law and it follows, naturally, that the Board was

justified in holding them jointly and severally liable for the back pay to the employees.

The same Court in a later decision followed and upheld the rule of the *Union Starch* case. This was in the matter of *National Labor Relations Board v. Acme Mattress Co.,* 192 Fed. (2d) 524. In this case the United States Court of Appeals for the Seventh Circuit declared as follows:

> "This court held in *Union Starch & Refining Co. v. National Labor Relations Board,* 186 Fed. (2d) 1008, that where the Board found that *both the employer and the union were responsible* for loss suffered by a discharged employee the Board properly held the employer and the union jointly and severally liable for back pay under the Act. * * *" (Italics ours.)

In the *Acme Mattress* case the company made *no objection* to the inclusion of a union-shop clause in the projected contract despite the fact that neither of the unions involved had ever been certified by the Board as a result of a Board conducted election to determine whether the majority of employees in the union desired to authorize the labor organization to make such an agreement with the employer. In this case a strike took place over a wage issue. One of the union employees expressed dissatisfaction with the conduct of a representative of the International Union. Subsequently the international representative told the employer that he would have to discharge the employee in question before a contract was signed.

Although the employer protested, he, nevertheless, went into a conference with the union at which time the contract was signed and the employee was discharged one hour after the strike was ended.

There was no showing whatever of any resistance to the illegal union security clause by the employer and only a perfunctory objection to discharging the employee in question. There was evidence from which the Board could have found both the employer and the union responsible for the unfair labor practice. Indeed, and very significantly, the employer did not attack the finding of the Board that both the employer and the union were responsible, but confined its objection to the fact that the order should not be directed against it because, subsequent to the episode in question, the company had been judicially declared insolvent and was not then actively engaged in business. The Court however held that this was not an adequate defense.

The next case in point of time is *National Labor Relations Board v. Newspaper Deliverers Union,* 192 Fed. (2d) 654, decided by the United States Court of Appeals for the Second Circuit. This also involved a petition of the National Labor Relations Board for enforcement of an order holding both the employer and the union jointly and severally liable for back pay. In that case the Court said:

> "It is also argued that the Board *cannot* order both the union and Hearst to compensate these individuals jointly and severally. We are in ac-

cord with the holding in Union Starch & Refining Co., 186 F. (2d) 1008, that the Board may impose such joint and several liability when both the union and the employer have engaged in discriminatory practices. It is also argued that Hearst cannot be found guilty of violating the Act or be ordered to compensate injured employees because it engaged in such practices only under union coercion. Threats of strike and actual strikes, economic coercion is no excuse for violating the Act we have already decided in similar situations." (Citation.) (Italics ours.)

It will thus be seen that the arguments addressed to the United States Court of Appeals for the Second Circuit were, first, that the Board *could not hold* both the employer and the union liable for the back pay. This is in effect a reiteration of the argument advanced by the employer in the *Union Starch* case to the effect that the Board was compelled to make an election of one or the other but could not hold both liable jointly and severally. We have no quarrel with the rule laid down by the Court in the *Union Starch* case that on a proper set of facts the Board may on the evidence presented find that both the union and the employer were responsible for the discrimination. An example of this is the *Union Starch* case itself where the employer discharged the employees at the demand of the union but after the employer's own independent investigation.

The second point argued in *National Labor Relations Board v. Newspaper Deliverers Union* is that

the employer could not be found guilty of violating the Act because it engaged in such practices only under coercion or strikes or threatened strikes. The rule is well established that an employer may be *guilty of a violation of the statute* even though it acts under union coercion, including strikes. This is not the narrow issue which we desire to present to the Court.

Even though the employer has acted under union coercion, the Board may find that the employer *has discriminated* against the employee and may order the employer to *reinstate* such employee in order to effectuate the purposes of the Act. However, on the single, narrow issue of *liability for back pay,* the statute specifically provides that back pay be ordered against the employer or the labor organization, as the case may be, *responsible* for the discrimination. There was no argument on this point either in the *Acme Mattress Co.* case or in *National Labor Relations Board v. Newspaper Deliverers Union* and these cases cannot be considered as authorities in support of the position of the Board.

A later decision by this Court in the case of *National Labor Relations Board v. Fry Roofing Co.,* 29 L.R.R.M. 2221 (C.A. 9 Nov. 30, 1951) also announces the rule that the fact that the employer's acts were done under coercion of the union or under economic duress does not constitute a defense to a charge that the employers violated the statute.

This, however, is not a ruling on the explicit language of the statute above referred to.

PRIOR BOARD RULINGS ON UNION LIABILITY FOR BACK PAY.

The two types of violation of the statute resulting from union activities directed against individual employees because of their non-membership in a labor organization are those set forth in Sections 8(b)(1) and (2) of the statute. Section 8(b)(1) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Subdivision 2 makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of subsection 8(a)(3).

The National Labor Relations Board itself has declared that union violations of Section 8(b)(1) (restraint or coercion of employees) *do not result in a liability of the union for back pay.* According to the Board the *only* section of the statute in which a union liability for back pay is contemplated is a violation of Section 8(b)(2), or, more narrowly, only where the union has in fact *caused* the employer to discriminate against an employee.

This is illustrated by the recent decision of the Board in the matter of *Electrical Workers Union,* 95 N.L.R.B. 47, 28 L.R.R.M. 1323. In this case the Board said as follows:

> "The trial examiner recommended that the union be required to make whole the three employees who were kept from working during the strike called by the union when the employer refused the union's request for a discriminatory reduction of these employees' seniority.

"This recommendation is rejected for the reasons stated in the Colonial Hardwood case."

We return now to the *Colonial Hardwood* case. In this case (*Colonial Hardwood Flooring* case, 85 N.L.R.B. 563, 24 L.R.R.M. 1302), the strikers physically impeded the non-strikers and prevented their entering the plant. There were additional threats and acts of physical violence. The Board found that the international and the local were liable for all these acts of restraint and coercion which the Trial Examiner found to be unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Back pay was refused, however, in this case, the Board saying:

"Like the Trial Examiner, we deny the request made by the Company for an order indemnifying employees for any loss of earnings they may have suffered because of the Respondents' unfair labor practices.[5] We believe that we are *without power* to take such a step in the absence of an express mandate from Congress. The amended Act provides that back pay may be required of a labor organization *only* where it is responsible for unlawful discrimination against an employee.[6] An award of back pay here would be in the nature of damages to the employee for an interference with his right of ingress to the plant, as contrasted with compensation to him for losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his employer in the ordinary case in which back pay is awarded *and*

to which Section 10(c) of the Act has been held for many years to refer. The Act contains *no* provision authorizing the Board to require damages or back pay of a labor organization under such circumstances.[7] Nor is there any legislative history that could impel a conclusion that such awards are authorized. We therefore find that the Board lacks power to grant the remedy requested by the Company in this case." (Italics ours.)

"5. The General Counsel excepted to the Trial Examiner's refusal to recommend such a remedy, but has since withdrawn his exception. However, the Company, which also excepted in this respect, pressed its exception when it argued orally before the Board.

"6. The relevant portion of Section 10(c) of the Act, where the power of the Board to issue orders to prevent and remedy unfair labor practices is granted, is as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

"7. See *Matter of National Maritime Union of America*, 78 NLRB 971, where the Board similarly held that it had no power to require damages of a labor organization responsible for unfair labor practices resulting in injury to certain employers."

As it now appears from the rulings of the Board that the *only* case in which a union may be held liable for back pay is the case where the union has in fact caused the employer to discriminate against an

employee, it must follow that this is the only situation to which the provisions of Section 10(c) of the statute are applicable.

The decision of the Board in the *Electrical Workers Union* case and the *Colonial Hardwood Flooring* case are two specific rulings of the Board to the effect that the union is not liable for back pay in cases of violations of Section 8(b)(1), namely, where the union has restrained or coerced the employees in the exercise of the rights guaranteed in Section 7. We think it is possible to state further that the decision by the Board in the *Electrical Workers Union* case is a ruling to the effect that the union is not liable for back pay in a case where it struck an employer and shut down his operations in an effort to cause the employer to discriminate against certain employees. Under the ruling of the Board there was no liability of the union so long as its efforts to cause the employer to discriminate were unsuccessful even though they closed down the employer's operations and thereby threw the employees in question out of work. It follows logically, therefore, as we have said under these decisions, that the *only* case in which a union is liable for back pay is a case where the union has in fact *caused* the employer to discriminate against an employee—*in other words, a case where both the union and the employer have violated the statute.* Therefore, this is the *only* situation to which Section 10(c) applies.

It then becomes appropriate to inquire into the proper meaning and interpretation of the word "re-

sponsible" as used in the relevant portions of Section 10(c) so frequently cited herein. It is respectfully submitted that, as used in such section, the words "responsible for the discrimination" *cannot* be interpreted as being synonymous with "having violated the statute" or "having committed an unfair labor practice".

There would be no sense to this provision of Section 10(c) nor any purpose in its inclusion in the statute if both the employer and the union were automatically responsible for the discrimination by reason of the fact that the employer had discriminated against an employee and the union had caused it to do so. In *every* such case the liability would be joint and several and the directions of Section 10(c) would be meaningless.

But the legislative history clearly demonstrates that the legislature had no intention of making the employer and the union jointly and severally liable for back pay in such case but intended that the entire liability for back pay should be assessed against whichever of these two parties was responsible for the discrimination.

This is shown by Senate Report No. 105 on S-1126 (Legislative History LRMA 1947) at page 432, which reads in part as follows:

> "Section 10(c). This subsection is amended by the proviso in two respects: (1) Back pay may be required *of either the employer or the labor organization, depending upon which is responsible* for the discrimination suffered by the employee." (Italics ours.)

While it may not be reasonable to argue as was done in the *Union Starch* case that, *assuming* both parties are *equally* responsible, the Board has power to require back pay of only one, it is just as unreasonable to argue that the above language was intended to permit the Board uniformly to require back pay of both parties in all cases or in any case when in fact only one party has affirmatively caused the discrimination and the other party has attempted to resist it.

Therefore it seems obvious that if the Board has laid down a rule that in every case where the union has caused the employer to discriminate against a union, the Board will hold both the union and the employer jointly and severally liable for the back pay, the language of Section 10(c) of the statute has been nullified by the Board. This is exactly what the Board has done.

The Board has, in apparent disregard of the mandate of the statute, not only found that both the employer and the union were responsible for the discrimination in *every* case to come before it, but has deliberately announced the rule *that it will so find in every case.*

In the matter of *H. M. Newman,* 85 NLRB, Case No. 132, at page 725, the Board found that the union had violated the statute by its insistence that an employee be laid off because he was delinquent in his union dues and by the union's refusal to permit other drivers to operate Newman's trucks unless the employee were laid off, and it was also found that by

yielding to the union's insistence the employer had violated the statute.

In the discussion of the remedy the Board said as follows:

> "The Trial Examiner found that although the Respondent Employer was primarily responsible for the lay-off of Fritz, Newman would not have laid him off if not for the pressure of the Union and that, under these circumstances, the Employer and the Union were jointly and severally liable for back pay. Although we agree with the Trial Examiner's conclusion, we reject his finding that the Employer was primarily responsible for the discrimination against Fritz.
>
> "*The Act makes no distinction between primary and secondary responsibility for discriminatory treatment of an employee.* It merely provides, in Section 10(c) that: (Italics ours.)
>
> "* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: *Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.* * * * (Emphasis added.)"

After further discussion the Board continued:

"The provision of Section 10(c) which states that, in an unfair labor practice proceeding, 'back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered' by an employee, confirms and extends the broad discretion which has always vested in the Board to determine which of the means available to it to employ to remedy unfair labor practices. Therefore, where, as here, the Board finds that an employer and a labor organization are *both* responsible for the discrimination against an employee, the Board's back-pay order may be directed against both. *As we have found that both the Respondent Employer and the Respondent Union were responsible for the discrimination* suffered by Fritz, we shall order them jointly and severally to make him whole for any loss of pay which he suffered by reason of the discrimination against him." (Italics ours.)

The footnote to such discussion reads as follows:

"Compare the rule generally applicable in tort actions that, 'each of two or more persons whose tortious conduct is a legal cause of harm to another is liable to the other for the entire harm.' *Restatement of the Law*—Torts, Vol. IV Sec. 875. 'For harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct knowing of the conditions under which the act is done or intending the consequences which ensue, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the

other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' *Ibid.,* Sec. 876. 'A person whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result. Nor are the damages against him thereby diminished. This is true where both are simultaneously negligent and also where the act of one either occurs or takes harmful effect after that of the other. It is immaterial that as between the two, one of them was primarily at fault for causing the harm or that the other, upon payment of damages, would have indemnity against him.' *Ibid.,* Sec. 879."

The same line of reasoning is carried forward into the concluding footnote in the brief filed on behalf of the Board in the case now before this Court. For convenience, we quote the footnote which reads as follows:

"cf. The rule commonly applied in the field of torts that when the acts of two or more persons result in a legal wrong all of the tort feasors are jointly and severally responsible for the entire damages without regard to which of them initiated the wrong even though one of them may have acted under duress." (Restatement of the Law—Torts, Vol. IV, Sec. 879.)

The analogy which the Board attempts to make to the case of joint and tort feasors is not well drawn. It has repeatedly been decided by the Supreme Court

of the United States, by this Court, and by the Board itself, that the rights being enforced under the National Labor Management Relations Act are not *private* rights but are *public* rights. Therefore, if, as a matter of policy in enforcing these public rights, the Congress deems that the policy of the statute will be best effectuated by imposing the entire liability for back pay upon whichever of the two parties is responsible for the discrimination, this is a direction in plain language which the Board must follow and cannot avoid by reliance on the analogy to private rights and the liabilities of joint tort feasors.

But the General Counsel goes considerably further than even this position of the Board and insists that the Board has the right in its sole discretion to assess the entire back pay *against whichever of the parties it chooses.* We quote from General Counsel's opposition to the motion to remand, previously argued before this Court in this case, which quotation appears at pages 57 and 58 thereof and reads as follows:

> "The Board as the agency exclusively vested with the responsibility for the effectuation of the policies of the Act, has the corresponding responsibility of making its own administrative determination of how and against whom to proceed. This is so at all stages of the proceeding, from the issuance of the complaint, the rendition of the order, the institution of enforcement proceedings, and thereafter of contempt proceedings. *Amalgamated Uitlity Workers v. Consolidated Edison Co.,* 309 U.S. 261, 265. This Court, in reliance on such cases as *Consolidated Edison Co.* and *N.L.R.B. v. Indiana and Michigan Electric*

> *Co.,* 318 U.S. 9, 18, 19, has upheld the Board's right to determine administratively the manner and extent to which it may proceed in discharge of its function in administering the Act. *N.L.R.B. v. Haleston Drug,* 187 F. (2d) 418 (C.A. 9), certiorari denied 28 LRRM 25. It would seem clear from the *Amalgamated Utility* case, *supra,* that even if the Board had issued an order against I.L.W.U. instead of Contract Guards it would still be within the Board's administrative discretion to determine whether to proceed against Pinkerton's alone, I.L.W.U. alone, or both; and also in the event of a decree against both, it would still have the option to proceed against both or either (id.)."

It is respectfully submitted that the conclusions which the General Counsel draws from the cases cited in the above excerpt are not warranted by the decisions themselves.

Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. at p. 261, held that private parties are without standing to enforce the Board's orders.

That portion of the opinion in *N.L.R.B. v. Indiana and Michigan Electric Co.,* 318 U.S. 9 at p. 18, obviously relied upon by the General Counsel in the above quotation, merely declared that the Board is not required by the statute to move on every charge. It is merely enabled to do so.

The decision of this Court in *N.L.R.B. v. Haleston Drug,* 187 F. (2d) 418, was to the effect that the Board in its administrative discretion may decline to proceed where the Board has concluded that such

proceeding would not effectuate the purposes of the Act. In that case this Court said in part as follows:

> "By the express language of Section 10(a) the Board was and still is empowered (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the Act as it existed prior to 1947. In *NLRB v. I. & M. Electric Co.,* 318 U.S. 9, the Court noted that 'the Board has wide discretion in the issue of complaints * * *. It is not required by the statute to move on every charge; it is merely enabled to do so. * * *.' "

From these decisions the General Counsel reasons,

> "* * *. It would still be within the Board's administrative discretion to determine whether to proceed against Pinkerton's alone, I.L.W.U. alone, or both; and also *in the event of a decree against both it would still have the option to proceed against both or either."* (Italics ours.)

But while the statute, in "empowering but not directing" the Board to prevent unfair labor practices, clothes the Board with a wide discretion as to whether to assert jurisdiction or institute proceedings, this is not the intent or purpose of the portion of the statute dealing with the subject of back pay. The statute declares that the party *responsible* for the discrimination shall be liable for the back pay. If one of these two parties is responsible for the discrimination we do not see how or in what manner the Board is given the discretion or empowered by

the statute to assess back pay against the other party, either jointly or severally.

In short, we submit that if Section 10(c) does not require the Board to assess the entire liability for back pay upon the union in this case there is no case in which it would, and the words of the statute are meaningless.

THE STENHOUSE CASE.

What has been said here by way of argument concerning the application and interpretation of Section 10(c) of the statute applies equally to all of the four employees involved.

It is obvious that the union threatened to strike if Stenhouse were re-employed and that when the strike was actually called by the union its purpose was not limited to compelling the discharge of the three other complainants but was for the purpose of preventing the employment of Stenhouse or anyone else in good standing with the union. The strike was just as much a strike against the re-employment of Stenhouse as it was to secure the discharge of the three other complainants.

On such set of facts the Trial Examiner found the employer and the union jointly and severally liable for the discrimination against all four complainants, but the Board overruled or reversed the Trial Examiner upon the ground that the complaint did not allege that the union was responsible for Stenhouse's discharge (R. p. 79), and concluded:

> "We are not warranted in going beyond the complaint to find on the record as it exists that the Organizing Committee violated Section 8 (b) (2) by inducing Pinkerton's to discharge Stenhouse." (R. p. 80.)

The Board therefore relies on its own failure to issue a complaint against the union as a justification for imposing the entire liability for back pay against the employer in the *Stenhouse* case.

In fact, so far as we know, the Board has uniformly followed the principle of assessing the entire amount of back pay against either the union or the employer if it was the only party before the Board. For example, see *N. & Pencil Workers Union,* 91 NLRB 155, 26 LRRM 1583, where the Board said:

> "As the employer, who is not a respondent, has sole control over the employment of its employees, we cannot order that Becker be reinstated. We can, however, order the respondent union to take such action as is within its power to remove the barrier which it has erected to Becker's employment by the employer. * * * Accordingly, we shall order the respondent (1) to pay Becker a sum of money equal to the amount that she would normally have earned as wages. * * *"

See also *Insulators & Asbestos Workers Union,* 92 NLRB 753, Case No. 134, 27 LRRM 1145, where the union, which was the sole defendant, was found guilty of causing the employer to discriminate against six

employees and was, in addition, ordered to make them whole for any loss of back pay.

A still more recent case is that of *National Labor Relations Board v. United Automobile Workers, CIO,* 29 LRRM 2433, where the United States Court of Appeals for the Seventh Circuit enforced the order of the Board. In this case the Board found that the union had caused the employer to discriminate against an employee, and, the union being the sole defendant, the Board ordered the union to make the employee whole.

On the other hand, where the employer is the sole defendant before the Board, the Board has directed that the employer be solely and entirely responsible for all back pay due. In the case of *General Electric X-Ray Corporation,* 76 NLRB at p. 64, the employer raised the defense that Section 10(c) requires that the Board assess the back pay against the party "responsible" for the discrimination, but the Board replied:

> "The respondent is the only person alleged in the complaint to have committed an unfair labor practice. *It is the only person that can be deemed responsible for the discrimination found."* (Italics ours.)

Thus it appears that the Board enforces the entire liability for back pay against whichever party happens to be before it. This, it is submitted, is not in accordance with the requirements of Section 10(c)

of the statute, which declares that the party *responsible* for the discrimination shall be liable for the back pay.

The fact that only one party is before the Board *is the result of the Board's own action.* It is the result of an administrative determination made by the Board in advance of the trial and it is on the basis of such administrative determination before either party has had a fair hearing and a trial that the Board endeavors to enforce its rule assessing the entire liability against whichever party is before the Board.

Whatever may be the rule as to the discretion of the Board in issuing or not issuing a complaint against an employer in a case where the union has caused the employer to discriminate against an employee (as in the case of *National Labor Relations Board v. Auto Workers, supra*), we do not believe that the provisions of Section 10 (c) of the statute permit the Board in such case to issue a complaint against the employer only. Such would negate the requirements and intent of Section 10 (c) of the statute with respect to back pay. The Board is limited in such case to ordering reinstatement by the employer, but without back pay.

In the *Stenhouse* case the matter should be remanded to the Board with directions to issue a complaint against the union and with instructions to find whether the employer and the union were both re-

sponsible for the discrimination or whether only one was responsible for such discrimination.

CONCLUSION.

1. On the uncontradicted facts of this case the employer did its utmost to comply with the law, and the union insisted on proceeding in disregard of the law to the extent of striking the employer and threatening to put the employer out of business unless it complied with the union demands. It is therefore respectfully submitted that the statute directs that back pay be required of the union as the *only* party responsible for such discrimination.

2. There is not substantial evidence on the record considered as a whole to support a finding of the Board in this case that both the employer and the union are responsible for the discrimination or to support an order making the employer and the union jointly and severally liable for the back pay.

3. Where, upon the facts as shown by the record and the findings of the Trial Examiner, the union is responsible for the discrimination suffered by the employee Stenhouse, the Board should not be permitted to assess the back pay in such case solely against the employer by reason of the Board's own administrative determination in advance of the trial not to issue a complaint against the union. The case

should be remanded to the Board for further proceedings.

Dated, San Francisco, California,
March 10, 1952.

Respectfully submitted,
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